Ombudsman
Fairness for all

Opinion

Request for information about staff grievances and allegations of bullying

Legislation	Local Government Official Information and Meetings Act 1987, ss 6(a), 7(2)(a), 7(2)(c)(ii), 7(2)(i), 8, 17(b), 17(c)(i), 41
Requester	Sam Sherwood on behalf of Stuff
Agency	Selwyn District Council
Ombudsman	Peter Boshier
Case number(s)	458292
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Summary

Sam Sherwood, on behalf of Stuff, made a request to Selwyn District Council for information about staff grievances and allegations of bullying. The Council refused the request under section 17(b) of Local Government Official Information and Meetings Act 1987 (LGOIMA), neither confirming nor denying the existence or non-existence of the information requested.

Pursuant to sections 6(a) and 8 of LGOIMA, the Council explained that confirming or denying the existence or non-existence of the information requested would be likely to prejudice the maintenance of the law. The Council went on to advise Mr Sherwood that even if the information requested did exist, it would have good reason for withholding it under sections 7(2)(a), 7(2)(c)(ii), 7(2)(i) and 17(c)(i) of LGOIMA.

Based on the information before me, I have formed the opinion that it was unreasonable for the Council to rely on section 17(b) of LGOIMA to refuse the information requested; and that the ancillary withholding grounds that the Council would have otherwise relied on did not provide good reason for refusing the information requested in its entirety. I recommend that the Council release certain information about staff grievances and allegations of bullying. The Council complied with my recommendation.

Ombudsman's role

1. I am authorised to investigate and review, on complaint, any decision by which an agency subject to LGOIMA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

Background

2. On 9 June 2017, Mr Sherwood made a request to the Council for information about staff grievances, settlements and allegations of bullying in six separate questions:

    1. *How many staff have resigned from the Selwyn District Council since January 1 2016? Combined length of service for those staff. Also, I would like the resignations separated by departments.*

    2. *How many confidential payouts have been made to staff? How much money has been spent in confidential payouts?*

    3. *How many personal grievances have been laid against the council since January 1, 2016? Outcome of each personal grievance, including how much money spent in relation to these claims?*

    4. *How many staff members have raised allegations of bullying at the council? Outcome of those allegations?*

5. *All communication received by council management from council staff alleging bullying since January 1, 2016.*

6. *Senior management team names for all departments in 2016 and 2017.*

3. On 10 July 2017, the Council provided the information requested in questions (1) and (6). Under section 17(b) of LGOIMA, the Council explained that it could neither confirm nor deny the existence or non-existence of the remaining information sought. The Council advised that section 6(a) of LGOIMA applied in the circumstances of the request: that confirming or denying the existence or non-existence of the information requested would be likely to prejudice the maintenance of the law. The Council advised that even if the information requested did exist, it would have good reason for withholding the information under sections 7(2)(a), 7(2)(c)(ii), 7(2)(i) and 17(c)(i) of LGOIMA.

4. On 17 July 2017, Mr Sherwood made a complaint about the Council's decision on his request.

Investigation

5. On 11 August 2017, the investigator assisting me with this complaint, met with the Council to discuss Mr Sherwood's complaint. It was agreed that the investigation and review of this complaint would address both the primary and ancillary grounds of refusal. In clarifying this complaint with Mr Sherwood, he agreed that this investigation and review could be limited to the Council's refusal of the information requested in questions (2) to (4) of his request.

6. On 18 August 2017, Ombudsman Leo Donnelly notified the Council of his intention to investigate and review its refusal of the following information (for the period 1 January 2016 to 9 June 2017): the number, and value, of confidential pay-outs made to staff; the number, outcome and cost of personal grievances made against the Council; and the number, and outcome, of allegations of bullying raised by staff.

7. On 15 September 2017, the Council provided its report and a copy of the information at issue. On 12 April 2018, Mr Donnelly formed a provisional opinion, and invited the Council to comment before he decided whether to confirm his provisional opinion as final. On 24 April 2018, the Council provided its comments.

8. On 12 April 2018, Mr Donnelly also wrote to the Privacy Commissioner in accordance with section 29A of LGOIMA, to ascertain his view on the privacy interest raised in this case. On 25 May 2018, Mr Donnelly completed that consultation.

9. On 21 June 2018, as Mr Donnelly's warrant was due to end, I assumed responsibility for the investigation of these complaints. I reviewed the file and material provided in the course of this investigation. I agree with the approach taken by Mr Donnelly in his provisional opinion. After carefully considering the Council's most recent comments, I have formed my final opinion.

Analysis and findings

Information at issue

10. There are three pieces of information that are under consideration for the purposes of my investigation and review. The first is the number, and value, of confidential payments made to staff (the pay out information). The Council has explained that it can disclose this information to Mr Sherwood as it reports on 'severance payments' in its annual report.[1]

11. The second piece of information is the number, outcome and cost of personal grievances made against the Council (the personal grievance information). The Council has explained that this information is a class within the pay out information, being a more specific type of a severance payment.

12. The final piece of information is the number, and outcome, of allegations of bullying raised by staff (the bullying information).

Section 17(b)—neither confirm nor deny

13. In my opinion, it was unreasonable for the Council to rely on section 17(b) of LGOIMA to refuse the information requested.

14. Generally, when an agency receives an official information request under LGOIMA, it will consider the request and make a decision to either release or withhold the information sought. However, in certain circumstances, even confirming or denying whether the information requested exists, could prejudice certain interests that are protected by LGOIMA. In those circumstances, pursuant to section 17(b), the agency can give the requester notice that it neither confirms nor denies the existence, or non-existence, of the information requested.

15. Section 17(b) is subject to section 8 of LGOIMA, which provides that there are limited circumstances in which an agency can rely on this provision. It is limited to situations where confirming the existence or non-existence of the information requested would result in prejudice to the maintenance of the law, or endanger the safety of any person, as set out under section 6; or would result in a commercial prejudice as set out under section 7(2)(b)(ii).

16. Therefore, an agency can only rely on section 17(b) to refuse the information requested, when disclosing whether or not the information exists would be likely to prejudice the limited interests under sections 6 or 7(2)(b)(ii) of LGOIMA. This is a subjective test, and

[1] Section 33(2) of the Local Government Act 2002 defines a severance payment as *'any consideration that a local authority has agreed to provide to an employee in respect of that employee's agreement to the termination of his or her employment, being consideration, whether of a monetary nature or otherwise, additional to any entitlement of that employee to—(a) any final payment of salary; or (b) any holiday pay; or (c) any superannuation contributions.*

the agency must be satisfied that the prejudice would be likely to occur. For an Ombudsman's investigation and review, the question that I must determine is whether it was reasonable for the agency to reach the conclusion that it did.

17. The Council relied on section 6(a) as the basis for refusing the information, pursuant to sections 8 and 17(b) of LGOIMA. Section 6(a) provides that good reason for withholding information exists if making it available would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

18. In applying section 6(a) in this context, I must determine whether there is a real or serious risk that prejudice to the maintenance of the law will be the result of confirming or denying whether or not the information requested exists. Importantly, observance of, or conforming to, the law is not the same thing as 'maintaining' it. As the interest protected by this section is the law enforcement capability of public sector agencies, the agency must be able to demonstrate more than that it was acting under statutory authority or following a statutory process. There must be a connection between the information requested, and a process of enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards.

19. The Council has referred me to a number of previous Ombudsman cases where section 6(a) was at issue.[2] In my view, all of these cases illustrate that there must be a connection between the information requested, and a process of enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards. I will explain these briefly.

20. The first case concerned the Ministry of Economic Development, which withheld certain information to protect the robustness of a statutory inquisitorial process.[3] In that case, disclosing the information at issue would have prejudiced the maintenance of the law, as the Minister of Commerce would have been unable to control the security exchange or regulate the financial markets effectively.

21. The second case involved the Police's refusal of a licence applicant's diversion history that was requested by the Land Transport Safety Authority.[4] The process of diversion provided an incentive not to reoffend as it avoided the consequences of a conviction on a person's record, and enabled the matter to be dealt with confidentially without further comeback. Disclosing the information requested would have fundamentally undermined the purpose of offering diversion, and thus removed the incentive not to reoffend. This in turn would have directly affected the Police's ability to prevent offences and therefore would have prejudiced the maintenance of the law.

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2 The equivalent section under the Official Information Act 1982 (OIA) is section 6(c).

3 Office of the Ombudsmen, *Ombudsman Quarterly Review* 11, Issue 3 (September 2005): 2.

4 See case W40692.

22. The third case concerned the Department of Corrections' refusal to release information about a prison's security and surveillance system to the requester, who was an inmate at that prison.[5] Disclosing the information to the inmate would increase the likelihood that they could challenge the security arrangements of their detention. In turn, this would likely have prejudiced the ability of the Department to prevent offences by inmates during the term of their incarceration, and thus prejudiced its ability to maintain the law.

23. The final case involved AgResearch's refusal of the names of animal ethics committee members.[6] Disclosure of the information would have likely prejudiced the maintenance of the regulatory system established under Part 6 of the Animal Welfare Act. Under that Part, the committee was responsible for monitoring animal management practices to ensure compliance with the terms of the code of ethical conduct. In light of a history of activist protest, were the officials' names revealed, that could have made it very difficult to attract people to the committee; and thus prejudiced its ability to enforce the law by ensuring compliance or investigating non-compliance with the legal rules and standards under the Animal Welfare Act.

24. These cases all demonstrate that the operation of section 6(a) requires a connection between the information requested and a process of enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards. To rely on this section, the Council must be able to demonstrate more than just that it was acting under statutory authority or following a statutory process.

25. The Council has explained that it relied on section 6(a), as the basis for its section 17(b) refusal, because confirming the existence or non-existence of the information requested would prejudice the integrity of the confidential dispute resolution process established by the Employment Relations Act 2000 (ERA).

26. Section 3(a) of the ERA explains that one object of the Act is to build productive employment relationships though the promotion of good faith in all aspects of the employment relationship. It then lists a number of ways by which this object can be achieved including: by promoting mediation as the primary problem-solving mechanism '*other than for enforcing employment standards'*; and by reducing the need for judicial intervention.[7]

27. Notably section 3(ab) of the ERA explains that a further object of the Act is to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court.

28. I consider that section 3 of the ERA draws a clear distinction between two particular objectives. The first objective is to build productive employment relationships: where mediation is one way that this can be achieved *other than for enforcing employment*

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5 See case W47885.

6 Office of the Ombudsmen, *Ombudsman Quarterly Review* 8, Issue 4 (December 2002): 2-3.

7 Sections 3(a)(v) and (vi) of the ERA.

standards. The second objective is to enforce employment standards: by conferring enforcement powers on particular officials and bodies.

29. In my view, these two objectives differentiate between observing or complying with the law, and enforcing it. It makes it clear that mediation can only be used where its purpose is not to enforce employment standards, but rather to address employment relationship problems. In undertaking a mediation, the Council is not enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards. It is simply following a statutory process. For this reason, I do not consider that it was reasonable for the Council to rely on section 6(a) to refuse the information requested, pursuant to sections 8 and 17(b) of LGOIMA.

30. In conclusion, I would like to note two further general points about the Council's refusal. First, confirmation of the existence of settlements could not prejudice the system of the ERA, as the existence of settlements can be presumed from the fact that the ERA provides for them. Second, by referring to ancillary withholding grounds, the Council effectively negated the protection that a section 17(b) refusal is intended to provide.

31. As the Council has accepted that it can disclose the pay out information to Mr Sherwood, I do not need to give that aspect of the Council's refusal any further consideration. I will now address the ancillary withholding grounds that the Council would have otherwise relied on, in respect of the personal grievance information and the bullying information.

Section 17(c)(i)—contrary to the provisions of a specified enactment

32. Section 17(c)(i) of LGOIMA provides that an agency may refuse a request for official information when making it available would be contrary to the provisions of a specified enactment. The Council submits that disclosing the information requested would be contrary to section 6, Information Privacy Principle 11 (IPP11) of the Privacy Act 1993; and sections 148 and 149 of the ERA.

Section 6, IPP11 of the Privacy Act

33. Section 10(1A) of LGOIMA provides that when a request is made for access to personal information, which is about that person, then the request will be considered under the Privacy Act. In the present case, as Mr Sherwood has not made a request for information about himself, the request must be considered under LGOIMA. The Privacy Act is not applicable in this case. In situations where a request is made for official information, and the Council is concerned that privacy issues may arise by its release, it is appropriate for it to consider those issues under section 7(2)(a) of LGOIMA. In my opinion, disclosing the information requested can therefore not be contrary to section 6, IPP11 of the Privacy Act.

Sections 148 and 149 of the ERA

34. Section 148 of the ERA deals with confidentiality in mediation. Section 148(1) provides that persons involved in mediation *'must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation'.*

35. Section 149 of the ERA deals with the subject of settlements. Section 149(1) provides that *'where a problem is resolved, whether through the provision of mediation services or otherwise, any person … may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement'.*

36. The Council submits that it is artificial to separate the terms of settlement from the mediation service, as the terms were created and signed during the mediation. The Council considers that the settlement agreement is a document created or made for the purposes of mediation, and so the information requested must remain confidential, pursuant to section 148(1) of the ERA.

37. The Council referred to a number of cases that it considers relevant to this point.[8] Each of those cases concerned statements (or in one case a letter) made during the course of mediation. Those cases simply illustrate that the purpose of section 148(1) is to enable parties to engage in free and frank discussions during mediation, by ensuring that those discussions are not admissible in subsequent court proceedings.

38. The Council has also submitted that the confidentiality of the mediation and the content of any agreement reached is absolute. However, I note that the Employment Court has recognised that there are public policy exceptions to mediation confidentiality, and *'the developing application of s 148 means that it is not an absolute prohibition on the recounting subsequently of any communications in or to do with mediation'.* [9]

39. I do not agree with the Council's suggestion that the settlement agreement is a '*document created or made for the purposes of the mediation*'. As such, I do not consider that disclosing the information requested would be contrary to section 148(1) of the ERA.

40. In my view, sections 148 and 149 of the ERA draw a clear distinction between the provision of the mediation services, and the completion of a settlement agreement upon the resolution of an employment relationship problem. Simply put, section 148(1) requires confidentiality in relation to the mediation, not the outcome of a dispute. Successive Ombudsmen have considered this issue over the years and have reached the same conclusion. I will explain the reasons why I do not consider that it is necessary to depart from the rationale of that conclusion.

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[8] *Lowe v New Zealand Post Ltd* [2003] 2 ERNZ 172 (EmpC); *Shepherd v Glenview Electrical Services Limited* [2004] 2 ERNZ 118 (EmpC); *Just Hotel Ltd v Jesudhass* [2007] NZCA 582; *Hamon v Coromandel Independent Living Trust* (*Hamon*) [2013] NZEmpC56 (10 April 2013).

[9] *Hamon*, see note 8, at [15] (citing *Rose v Order of St John* [2010] NZEmpC 163).

a. The ERA defines mediation services as *'the mediation services provided, under section 144, by the Chief Executive'.* For present purposes, the relevant part of section 144 reads: *'[t]hose mediation services may include … services … <u>that assist persons to resolve</u>, promptly and effectively, their employment relationship problems'.*

b. The underlined words suggest that completion of settlement documentation, which neither section 148 nor section 144 refers to, is not part of the *'mediation services'.* In my view, it is only services prior to the resolution of a problem that can properly be said '*to assist persons to resolve, promptly'* their problem.

c. Section 149 commences, *'[w]here a problem is resolved, whether through the provision of mediation services or otherwise…'*, and goes on to provide that in those circumstances a person who has authority to provide mediation services may also sign *'the agreed terms of settlement'* if requested by the parties. In other words, this section provides that where parties previously in dispute have resolved their differences (whether or not mediation services were involved), a person who is authorised to provide *'mediation services'* may also sign the terms of settlement.

d. The fact that section 149 speaks of the *'agreed terms of settlement'* having been arrived at *'otherwise'* than through the provision of mediation services, and requiring the parties to request a mediator to sign the agreed terms, appears to be a clear indication that *'mediation services'* have either been concluded or are unnecessary at the point where the section applies. Accordingly, the signing of a settlement agreement in accordance with section 149 cannot be part of the mediation process as contemplated by section 148(1).

e. Notably, the ERA treats both settlements and decisions alike. For example, section 152 distinguishes between challenges that may be made in respect of *'mediation services'* that have been provided and those that may be made in respect of *'terms of settlement'* or *'decisions'.* Again, this is consistent with the interpretation that the signing of a settlement agreement in accordance with section 149 cannot be part of the mediation process as contemplated by section 148(1).

f. This interpretation aligns with the operation of similar provisions in other statutes. For example, *Marine Resources (NZ) Ltd (in receivership) and Others v Attorney-General* considered the effect of section 19(6) of the Ombudsmen Act 1975.[10] Under that section, information given to an Ombudsman *'in the course of'* any Ombudsman's inquiry is inadmissible in evidence. The Court, in considering the matter, observed:

[10] *Marine Resources (NZ) Ltd (in receivership) and Others v Attorney-General* (Hamilton Registry, CP 213/91, 14 April 1999).

> *[43]… The section is limited by definition to statements made or answers given in the course of any inquiry by or proceedings before an Ombudsman.*
>
> *That suggests that if a statement is made for the purpose of inviting an inquiry or which, for example, lays down the terms and conditions under which an inquiry will be commenced, then such statements are not covered by section 19(6). By contrast a statement made after the decision has been made to take an inquiry as to how the inquiry will be conducted will attract the privilege granted by section 19(6).*
>
> *[44] This conclusion arises by the use of the words in the course of any inquiry, as used in section 19(6). Similarly statements made after the conclusion of an inquiry would not be covered by the section for the same reason. In short, they are not made in the course of the inquiry. (Underlining added).*

g. In the Court's view, the statute demarcated statements made during the course of an inquiry, from those made after it. Likewise, there is no reason to believe that under section 148(1) of the ERA, the words *'for the purposes of the mediation'* or *'in the course of the mediation'* would be given a wider meaning to include agreements signed after the mediation process was concluded.[11]

h. Similarly, the Justice and Electoral Committee, in its report about what became the Human Rights Amendment Act 2001, considered this issue. The amendment inserted confidentiality provisions parallel to those in the ERA for dispute resolution services. The Committee observed *'while dispute resolution meetings are subject to confidentiality provisions, settlements themselves are not'.* There was no intention that the statutory prohibition on disclosure of what goes on during such meetings was to apply to any settlement that might result.

i. While I accept that an obligation of confidence can attach to payments made in settlement of employment disputes (a contractual obligation rather than a statutory one), I do not consider that it was intended that agencies would not be accountable for payments made in settlement of disputes by signing a settlement under section 149 of the ERA. If that were so, section 149 would become little more than a device that agencies could use to escape being accountable for the spending of public funds in that context.

41. For the reasons explained, I am of the view that sections 148 and 149 of the ERA draw a clear distinction between the provision of the mediation services, and the completion of a settlement agreement upon the resolution of an employment relationship problem.

[11] I note the Council's suggestion that a verbal agreement, not reduced to writing, would be covered by section 148(1), as a statement made for the purposes of the mediation. For the reasons explained, the reaching of any agreement indicates that the problem has been resolved, and the mediation process (if undertaken) has concluded. Thus, a verbal agreement cannot be part of the mediation services contemplated under section 148(1).

Therefore, settlement agreements are not documents created or made for the purposes of the mediation.

42. In my opinion, the disclosure of the personal grievance information, which is high-level statistical information about a range of settlements that have followed mediation, would not be contrary to sections 148 and 149 of the ERA, and section 17(c)(i) of LGOIMA does not apply.

43. Turning to the bullying information, I agree with the Council's submission that any allegations of bullying that were disclosed during the respective mediations, would fall within the purview of section 148(1) of the ERA. However, an allegation of bullying that was disclosed prior to mediation, cannot be afforded that same protection. This is high-level statistical information that the Council held before the mediation took place. It is not information that was created or made *'for the purposes of the mediation'* or *'disclosed orally in the course of the mediation'.*

44. Therefore, in my opinion, section 17(c)(i) does not apply to one allegation of bullying disclosed prior to mediation.

45. For completeness, I note the entirety of the Council's arguments that under section 148(4) of the ERA the information requested is not required to be disclosed under LGOIMA. That section provides that *'nothing in the Official Information Act 1982 applies to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services'.*

46. Section 148(4) refers to the mediator, as appointed by the Ministry of Business Innovation and Employment, who is deemed not to be subject to the OIA. This section acts as an exception to the rules set out in sections 2(4) and 2(5) of the OIA, which provide that information held by an officer, employee or independent contractor engaged by an agency, shall be deemed to be information held by the agency for the purposes of the Act. This provision has no relevance to this case, which concerns official information held by the Council.

Section 7(2)(a)—protect the privacy of natural persons

47. Subject to any countervailing public interest consideration as set out in section 7(1) of LGOIMA, section 7(2)(a) provides that good reason for withholding official information exists if withholding it is necessary to protect the privacy of natural persons. The Council submits that there is a privacy interest in the information requested as it is of a confidential nature, and reveals information about the individual employees.

48. Privacy will only be relevant if the information either does, or could, identify an individual. In the period specified by Mr Sherwood, 34 individuals left the Council's employment, across five separate departments. Even with that information, I do not consider that Mr Sherwood would be able to identify the particular individuals the information relates to, nor any aspect about the nature of their grievance. The

information requested is high-level statistical information about a range of settlements that followed mediation, and one allegation of bullying that occurred prior to mediation.

49. As the Council relied on section 7(2)(a) of LGOIMA to withhold the information requested, Mr Donnelly consulted with the Privacy Commissioner in accordance with section 29A of LGOIMA to ascertain his views on the relevant privacy interests raised by this case. The Privacy Commissioner considers that the information at issue has a minimal privacy interest on the basis that the individuals to whom it relates are very unlikely to be identified. The Privacy Commissioner provided the following explanation for his view:

> *The nature of the information is sufficiently generic and relates to the Council as a whole (and not particular departments) so it would be unlikely that any particular individual could be identified either directly or indirectly. The fact that personal grievances and allegations of bullying were made does not automatically link them to any person. Similarly, while the outcomes and pay out amounts may be sensitive in nature, they cannot be associated with any particular person who left the Council during the stipulated period unless more specific information is provided. Further, the Council already publically report on 'severance payments' in their annual report.*

50. Taking all matters into consideration, in my opinion there is little or no privacy interest in this information, and section 7(2)(a) of LGOIMA does not apply.

Section 7(2)(c)(ii)—information subject to an obligation of confidence

51. Subject to any countervailing public interest consideration as set out in section 7(1) of LGOIMA, section 7(2)(c)(ii) provides that good reason for withholding official information exists if withholding it is necessary to protect information which is subject to an obligation of confidence, and where making it available would be likely otherwise to damage the public interest.

52. The Council considers that disclosure of the information at issue will prejudice its ability to maintain promises of confidentiality and achieve settlements, and that there is a strong public interest in maintaining the confidentiality of mediated agreements. Citing the case of *Hamon v Coromandel Independent Living Trust,*[12] the Council submitted that the Employment Court is reluctant *to 'acknowledge that there is any public interest in disclosing the terms of any mediated settlement'.* I do not agree that this authority supports the Council's submission.

53. The issue before the Court in *Hamon* was whether an alleged blackmail threat, as a statement made during the course of mediation, can result in an exception to mediation confidentiality as provided for under section 148 of the ERA. The Court's comments on the public interest in disclosure, also relate to a statement made during the course of

[12] See note 8.

mediation. That is a distinct issue from the present case, which concerns the disclosure of information about a range of settlements that followed mediation.

54. I also note the Council's references to other case law, in support of its argument that information obtained under LGOIMA does not release parties from their obligations of confidentiality under section 149 agreements.[13] However, I consider that the authorities cited envisage that certain information may be disclosed under LGOIMA, and where this occurs, that disclosure does not discharge the parties' obligation of confidence that is otherwise owed to one another.

55. There are four factors for me to consider when forming an opinion on whether section 7(2)(c)(ii) of LGOIMA applies. The first factor is to establish whether the information at issue is subject to an obligation of confidence.

56. I have reviewed the confidentiality clauses included in the terms of settlement. Three of the clauses state that *'these terms of settlement and all matters relating to the employment relationship problem shall remain, so far as the law allows, confidential to the parties'.* Although the fourth confidentiality clause does not include the qualification *'so far as the law allows',* I note that parties are unable to contract-out of statutory provisions and this proviso may reasonably be implied into the terms of settlement.

57. In light of the confidentiality clauses, I am of the view that the personal grievance information was covered by an obligation of confidence for the purpose of section 7(2)(c)(ii) of LGOIMA.

58. The second and third factors for me to consider are precisely how release of the information would damage the public interest; and the likelihood that disclosure would damage the public interest identified in this case.

59. I consider that there is a public interest in encouraging parties to resolve employment relationship problems through mediation, rather than through judicial intervention. Mediation can be less costly and more expeditious than court action, which in turn benefits the public purse through reduced administration costs.

60. The Council referred to an Ombudsman case note where the Ombudsman upheld an agency's decision to withhold a copy of the terms of settlement of a personal grievance.[14] In that case, the Ombudsman noted that if disclosure of information would prejudice the ability of an agency to maintain promises of confidentiality, and thereby achieve settlement in appropriate cases, then disclosure would be likely to damage the public interest for the purpose of section 7(2)(c)(ii) of LGOIMA.

61. Notably, the case note concerned a request for the terms of settlement of an identifiable out of court settlement, and is clearly distinguishable from the present review. I do not accept that the disclosure of high-level statistical information, which covers a range of

[13] For example, *ITE v ALA* [2016] NZEmpc 42.

[14] See case W35268.

settlements, would damage the public interest in encouraging parties to resolve employment relationship problems through mediation, rather than through judicial intervention. I do not consider that parties would be less willing to, or be dissuaded from, resolving their employment relationship problems through mediation, by the disclosure of this particular information. In my view, this information demonstrates that mediation can be one way to address employment relationship problems effectively, thus supporting the public interest in encouraging parties to participate in mediation.

62. In light of my analysis above, it is not necessary for me to go on to consider the fourth factor as to whether the prejudice is so likely to occur that it is necessary to withhold the information at issue. For the reasons explained, it is my opinion that section 7(2)(c)(ii) of LGOIMA does not apply to the personal grievance information.

63. Turning to the bullying information, the Council has submitted that the confidentiality of the settlement agreement covers all matters relating to the employment relationship problem, and therefore section 7(2)(c)(ii) applies in respect of the allegation of bullying disclosed prior to mediation. However, I do not consider that an obligation of confidence can attach retrospectively to the mere fact that an allegation was made, whilst not disclosing any of the details of that allegation. In my opinion, section 7(2)(c)(ii) does not apply to the remainder of the bullying information at issue.

64. I should also note that even if I had formed the opinion that section 7(2)(c)(ii) did apply, in this case I consider that the withholding of the information would be outweighed by other considerations which render it desirable, in the public interest, to make it available. This assessment is in keeping with the proviso and general understanding that there are limits to any promise of confidentiality, including the operation of LGOIMA.

65. For the purposes of section 7(1) of LGOIMA, transparency and accountability are public interest considerations that render it desirable to make the information at issue available. In the present case, I consider that there is a public interest in promoting the transparent conduct of public affairs, as transparency encourages good administration, good financial management and sound employment practices. Such transparency helps to foster effective accountability. If the Council is seen to be held to account for its actions as a public sector employer, then it is more likely to operate in the public interest.

66. These transparency and accountability factors would require the disclosure of the information at issue as it demonstrates how many personal grievances were settled through mediation, and what the cost of those grievances were. The same public interest would require the disclosure of information about how many allegations of bullying the Council has received, and an assurance that those allegations were treated appropriately.

Section 7(2)(i)—prejudice to negotiations

67. Subject to any countervailing public interest consideration as set out in section 7(1) of LGOIMA, section 7(2)(i) provides that good reason for withholding official information

exists if withholding it is necessary to enable the Council to carry on, without prejudice or disadvantage, negotiations.

68. The Council has explained that the negotiations for the purpose of this section are the negotiation of employment relationship problems.[15] The Council has said that disclosing the information requested may make parties less willing to accept confidentiality clauses, and possibly dissuade people from raising genuine personal grievances. The Council has also argued that disclosing the information at issue may set an expectation for employees that raising a personal grievance will result in a payment. The Council is concerned that disclosure may reveal the Council's negotiating position for future employment negotiations, which might be used to negotiate favourable settlement terms, to the disadvantage of the Council.

69. There are three factors for me to consider when forming an opinion whether section 7(2)(i) of LGOIMA applies. The first factor is whether the negotiations are scheduled or very likely to take place. Negotiations have no prescribed form, but should constitute a dialogue between two or more parties, intended to reach an understanding or resolve a point of difference.

70. I agree with the Council's submission that the mediation of an employment relationship problem falls within the definition of negotiations for the purpose of this section. However, at the time of the decision on the request, the negotiations to which the Council refers were not scheduled, and there is no suggestion that such negotiations were very likely to take place. This section does not apply where the negotiations are merely a possibility.

71. The second and third factors for me to consider are whether disclosure of the information would prejudice the ability of the Council to carry on the negotiations; and whether the predicted prejudice is so likely to occur that it is necessary to withhold the information in order to prevent that prejudice from arising. Whether such prejudice is likely to occur depends on the precise nature of the information and its relevance to the actual issues under negotiation.

72. Generally, Ombudsmen have accepted that the disclosure of information related to negotiations can decrease cooperation between the parties. Decreased cooperation curtails the ability of parties to participate in negotiations in good faith. This may result in reduced information sharing, and a reduced willingness to take account of one another's interests and to reach a level of compromise.

73. As explained above, the personal grievance information, and the remainder of the bullying information, is high-level statistical information. It does not disclose any information about the mediation, nor the respective positions of the parties during mediation. I do not consider that its disclosure would prejudice the ability of the Council

[15] Section 5 of the ERA defines an employment relationship problem as including *'a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment'.*

to carry on negotiations, were such negotiations likely to occur at the time of the decision on the request. For these reasons, in my opinion, section 7(2)(i) of LGOIMA does not apply to the information at issue.

Section 41—information made available in good faith

74. The Council has submitted that it is at risk of financial penalty for breaching the ERA by disclosing the information requested under LGOIMA. The Council has acknowledged section 41 of LGOIMA, which provides that where official information is made available in good faith, no proceedings shall lie against the local authority or any other person in respect of the making available of that information, or for any consequences that flow from the making available of that information.

75. However, the Council referred to a previous Ombudsmen Act investigation, where an agency had acted in good faith but its disclosure of information caused the affected individual to bear certain costs.[16] The Ombudsman in that case recommended that the agency make an ex-gratia payment to cover the costs and distress suffered by the individual. This case shows that the protection afforded by section 41 of LGOIMA does not affect an individual's rights of review under the Ombudsmen Act. Accordingly, a person affected by an agency's failure to withhold certain information could ask an Ombudsman to investigate the reasonableness of the agency's actions.

76. The particular case in question involved the accidental disclosure of an informant's name to the requester who consequently had to take out a restraining order. What this case illustrates is that an agency subject to the official information legislation must have robust systems in place for assessing whether there is good reason to withhold third party information; and ensuring that, once those decisions are made, information that should be withheld, is not inadvertently disclosed.

77. Furthermore, the mere possibility of an Ombudsmen Act investigation into the reasonableness of an agency's actions, in respect of a decision it has made to disclose official information, is not a reason for withholding that information under LGOIMA.

Further matters

78. There are three further points which the Council has raised in its correspondence, which I will address briefly.

79. First, the Council requested that it be provided with a copy of the Privacy Commissioner's report, which was sought from him under section 29A of LGOIMA. I have explained the Privacy Commissioner's comments above. I am unable to provide the Council with a copy

[16] Office of the Ombudsmen, *Ombudsman Quarterly Review* 12, Issue 1 (March 2006): 1-2.

of the report, as to do so would undermine the inquisitorial nature of my investigation, and the statutory requirement for me to conduct my investigation in private.[17]

80. Second, the Council suggested that due to its concerns about the far-reaching implications of my opinion, I should consult with other interest groups including the Chief Mediator of MBIE, the New Zealand Council of Trade Unions and the Employment Court. Under LGOIMA, as each case must be considered on its merits, I do not consider it necessary to undertake the consultations suggested.[18]

81. Third, the Council noted that I had not explained in my provisional opinion *'how the public interest is better met by a reporter seeking disclosure in this case'.*

82. Section 4(a) of LGOIMA explains that a key purpose of the legislation is to increase progressively the availability of official information to the public, in order to enable their more effective participation in the actions and decisions of local authorities; and to promote the accountability of local authority members and officials; and thereby to enhance respect for the law and promote good local government in New Zealand.

83. Generally, it is in the public interest that official information is made available to the news media via LGOIMA, as the media are able to inform the public and thus promote the purposes explained above. As the courts have recognised, the news media act as the *'surrogates of the public',* and have an important role to play in society.[19]

84. If the Council is concerned about how the information may be interpreted, it can release additional information proactively to provide proper context, thus improving transparency and public understanding.

Opinion and recommendation

85. For the reasons set out above, I have formed the opinion that it was unreasonable for the Council to rely on section 17(b) of LGOIMA to refuse the information requested; and that the ancillary withholding grounds that the Council would have otherwise relied on do not provide good reason for refusing the information requested in its entirety.

86. I recommend that the Council disclose the following information to Mr Sherwood, for the period 1 January 2016 to 9 June 2017:

    a. The personal grievance information (the number, outcome and cost of personal grievances made against the Council);

[17] Section 18(2) Ombudsmen Act 1975.

[18] Section 18(3) Ombudsmen Act 1975.

[19] *R v Liddell* [1995] 1 NZLR 538 at 546-547 (in articulating the rationale for openness in judicial proceedings).

b. Information about one bullying allegation that was disclosed prior to mediation, and advice that other information within the scope of this request has been withheld pursuant to sections 17(c)(i) of LGOIMA and 148(1) of the ERA.

c. The Council should also explain to Mr Sherwood that the pay out information (the number, and value, of confidential payments made to staff) is available in its annual reports, listed as 'severance payments'.

87. Under section 32 of the LGOIMA, a public duty to observe an Ombudsman's recommendation is imposed from the commencement of the 21st working day after the date of that recommendation. This public duty applies unless, before that day, the Council, by resolution at a meeting of the Council, decides otherwise and records that decision in writing.

88. The Council complied with my recommendation.